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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of GAOUSSOU
TAMBOURA and MARIAM KONE
TAMBOURA.

GAOUSSOU TAMBOURA,

Appellant,

v.

MARIAM KONE TAMBOURA,

Respondent.

A151889

(Alameda County
Super. Ct. No. HF14736105)

Gaoussou Tamboura appeals from an order in this dissolution case enforcing support obligations under the “Affidavit of Support” (I-864 Affidavit) that he was required to execute and file with Citizenship and Immigration Services (USCIS) to enable his then-wife Miriam Kone (formerly Tamboura) to remain in the country as a lawful permanent resident. The I-864 Affidavit committed Tamboura to supporting his former wife at least at 125 percent of the federal poverty level.

Following an evidentiary hearing in November 2016, the family law court issued a four-page, single-spaced “Decision” the following month, enforcing the affidavit and specifying Tamboura’s obligations thereunder. Six months later, in June 2017, the court filed a FL-340 form entitled “Findings and Order After Hearing,” which reiterated the court’s findings and rulings. Tamboura, proceeding in propria persona, thereafter filed a timely notice of appeal.

Tamboura does not take issue with the family law court's jurisdiction to enforce an I-864 Affidavit. Rather, he claims Kone fraudulently sought to remove the "conditions" on her lawful permanent residency status by applying for, and receiving, battered noncitizen spouse status under the federal Violence Against Women Act (VAWA). Tamboura asserts that, rather than granting Kone's application under the VAWA, the USCIS should have rejected her application and commenced deportation proceedings, and had it done so, he no longer would have had obligations under the I-864 Affidavit. He further claims that an agreement he made with Kone as to the parties' living arrangements "rescinded" his I-864 Affidavit obligations and that a family law court order made it "impossibl[e]" for him to comply with those obligations.

We affirm.

BACKGROUND

Given the issues on appeal, we need provide only a brief summary of the parties' relationship and their acts pertaining to the I-864 Affidavit.

In March 2013, Tamboura applied, as Kone's "sponsor," for her to remain in the country as a lawful permanent resident. As part of that application, Tamboura was required to complete an Affidavit of Support, wherein he committed to supporting Kone at no less than 125 percent of the federal poverty level until she met specific criteria. (8 C.F.R. § 213a.2, subds. (a), (d) [execution of affidavit creates a contract between sponsor and government], (e)(2)(i)(A)–(E) [circumstances terminating support obligation].)

These criteria are: the alien spouse (1) becomes a U.S. citizen; (2) has worked 40 qualifying quarters under the Social Security Act; (3) loses lawful permanent residency status; (4) is placed in removal proceedings, but is granted a new status adjustment through these proceedings based on a new affidavit; or (5) dies. (8 C.F.R. § 213a.2, subd. (e)(2)(i)(A)–(E).)

Sixteen months later, in July 2014, the couple separated, and, in August, Tamboura filed for dissolution.

Apparently, just prior to their separation, the parties agreed Tamboura, who was working as a software engineer, would leave his employment and become a full time graduate student so he could obtain a Master's Degree. He thereafter procured loans and grants to pay for his education and provide minimal support. They also agreed that while he was in school, Kone would return to their native country, Mali, and reside with Tamboura's family. Kone changed her mind, remained in California, and applied for government assistance.

The family law court ordered Tamboura to pay child support of \$210 a month, commencing July 15, 2014, and ordered spousal support of \$286 a month, commencing July 15 and terminating August 2015.

In the meantime, Kone sought a restraining order based on alleged domestic violence. While the superior court issued a temporary restraining order, it denied Kone's request for a permanent restraining order, finding, after an evidentiary hearing, that she was not a credible witness.

Kone also applied, in 2015, to the USCIS for removal of the "conditions" on her residency status on the ground she met the requirements for battered noncitizen spouse status under the VAWA.¹ In support of her application for VAWA status, Kone submitted the declaration she had submitted to the state court in support of her request for a restraining order. The USCIS granted Kone's application. Accordingly, removal proceedings were not instituted.

Kone additionally filed, in August 2015, in the still pending dissolution proceeding, a Request for Order to enforce the support obligations under the I-864 Affidavit.

Later that month, the parties reached a settlement on all dissolution issues, except support calculations and Kone's request to enforce the support obligations of the I-864

¹ The "conditions" on the lawful permanent resident status of an alien spouse are discussed in more detail in our discussion of the issues raised on appeal.

Affidavit. The court scheduled a hearing to resolve these issues, which was continued several times.

In early 2016, Tamboura completed his graduate education. Kone, in turn, completed her Cal Works plan and obtained part-time employment through April. She then spent two months in Mali. Upon returning, she found she had lost her part-time employment.² She found new, full-time employment in October.

The hearing on support calculations and enforcement of the I-864 Affidavit finally took place in November 2016.³ Tamboura opposed enforcement on two grounds. He first claimed Kone obtained VAWA status fraudulently and therefore her residency status should have been terminated and she should have been subject to deportation proceedings, which would have terminated his I-864 Affidavit support obligation. He secondly claimed Kone had agreed to leave the country to reside in Mali while he was a graduate student, and had she done so, she would not have needed his support. The court rejected both claims.

DISCUSSION

Kone's VAWA Status

The “conditional” basis of permanent resident status of an alien spouse, such as Kone, concerns the legitimacy of the marriage. If the Secretary of Homeland Security determines, within two years of the grant of permanent resident status, that the marriage was entered into for the purpose of gaining entry to the United States, or has been judicially annulled or terminated (other than by death of the resident spouse), the permanent resident status shall be terminated and the alien spouse will be subject to

² Tamboura claimed Kone voluntarily left her job. The trial court found no support for his assertion.

³ The focus of this hearing was largely centered on calculating Tamboura's support obligation. Issues concerning the I-864 Affidavit were addressed at various points during the hearing.

deportation proceedings. (8 U.S.C. § 1186a, subd. (b)(1)(A)(i)–(ii)⁴; see generally *Oropeza-Wong v. Gonzales* (9th Cir. 2005) 406 F.3d 1135, 1142 [generally discussing § 1186a].) During deportation proceedings, the alien spouse can ask for review of the status termination decision. (§ 1186a, subd. (b)(2); see generally *Sagoe v. Sessions* (8th Cir. 2018) 887 F.3d 417, 419 (*Sagoe*).)

An alien spouse must also act proactively within the two-year timeframe to remove the “conditions” on his or her residency status, which entails filing a petition and attending an interview. (§ 1186a, subd. (c).) The “conditions” will be removed if the Secretary determines the marriage was not entered into as a rouse to gain entry into the United States. (§ 1186a, subd. (c)(3)(B).)

If the sponsoring spouse refuses to assist with the petition and interview process, an alien spouse can apply to remove the “conditions” on the permanent resident status under a “hardship waiver.” (§ 1186a, subd. (c)(4).) One of the bases for such a waiver is the alien spouse or child was “battered by or was the subject of extreme cruelty” by the resident spouse. (§ 1186a, subd. (c)(4)(C), (D); see generally *Oropeza-Wong v. Gonzales*, *supra*, 406 F.3d at pp. 1143–1145 [extensive discussion of this “hardship waiver”].) In determining whether to grant a “hardship waiver,” the Secretary is to consider only circumstances occurring after the grant of permanent resident status. (§ 1186a, subd. (c)(4).) The Secretary may consider “any credible evidence relevant to the application.” (*Ibid.*) “The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Secretary.” (*Ibid.*) This proviso was added to “supercede” restrictive regulations the INS had adopted concerning the evidentiary showing required of an alien spouse seeking battered spouse status and to require “that immigration officials liberally admit evidence.” (*Oropeza-Wong v. Gonzales*, at pp. 1145–1146.)

⁴ All further statutory references are to Title 8 of the United States Code unless otherwise indicated.

The family law court was provided with a copy of Kone's application for battered spouse status under the VAWA, which it reviewed in camera. Tamboura claimed Kone's application was fraudulent "because there was never any finding of violence against her."

Having reviewed Kone's application, the court found "[s]he didn't say there was a finding." She "provided a copy of her request for the restraining order" and "a copy of her temporary restraining order. She did not say a permanent order was ever given. And she provided verification that she lived part-time in a shelter." The court then stated the USCIS had obviously found Kone's showing to be sufficient, since the Secretary granted her a "hardship waiver."

Tamboura complained Kone had provided the USCIS only "partial information," as she did not also provide a copy of the order denying a permanent restraining order. The family law court pointed out the USCIS apparently had never asked for that information, either initially or by following up on Kone's application and supporting documentation. In short, it appeared Kone "met whatever requirements they had," and the family law court could not "second-guess their requirements."

Tamboura makes these same assertions of fraud on appeal. Our standard of review, however is limited to determining whether the family law court's factual findings against Tamboura are supported by any substantial evidence, although conclusions of law based on undisputed evidence are reviewed de novo. (See *In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 146.)

The family law court's rejection of Tamboura's fraud claim is supported by the record. The court stated it had reviewed Kone's VAWA application, it identified the documents Kone submitted in support of her application, and it recited that Kone had not told the USCIS that she had obtained a permanent restraining order. In short, there was no evidence that Kone made any affirmative misrepresentations to the federal government.

Tamboura continues to maintain that because Kone did not also provide the USCIS with a copy of the order denying a permanent restraining order, she perpetrated a fraud in procuring VAWA status. However, the trial court found the USCIS did not

request this information in the first place. Nor did it follow up on this issue after receiving Kone's application attaching only a copy of the order granting a temporary restraining order. Again, these findings are supported by the record.⁵

As the family law court pointed out, section 1186a, subdivision (c)(4) expressly commits to the Secretary review of the evidence supporting a request for a "hardship waiver," and specifically states "what evidence is credible and the weight to be given that evidence" lies "within the sole discretion of the Secretary." (§ 1186a, subd. (c)(4).) Accordingly, even in a federal judicial proceeding challenging a status determination by the Secretary on direct appeal, the scope of the court's review is severely limited, and findings " 'are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.' " (*Sagoe, supra*, 887 F.3d at pp. 419, 423 [court cannot reweigh the evidence, but only determine whether substantial evidence in the record as a whole supports the agency's finding marriage was not bona fide].) Neither the family law court, nor this court, can begin to "second-guess" the Secretary's decision granting Kone a "hardship waiver"—if for no other reason, because this is not an appeal from the Secretary's status determination as to Kone and the complete record of those proceedings is not before us.

Neither *United States v. Ngige* (1st Cir. 2015) 780 F.3d 497 (*Ngige*), nor *Oropeza-Wong v. Gonzales, supra*, 406 F.3d at page 1135, cited by Tamboura, supports his effort in this case to collaterally attack the Secretary's determination that Kone provided sufficient support for a "hardship waiver."

⁵ We do appreciate Tamboura's frustration, however, given that in refusing to grant a permanent restraining order, the superior court found Kone "not to be a credible witness" and she was "often nonresponsive; she was aggressive and hostile when being cross examined." The court further pointed out she had "a clear motive to exaggerate or fabricate events, given her immigration status and her desire to stay in the United States, a result that would be facilitated by a finding of domestic violence. On the other hand, the court found [Tamboura] to be a credible witness. [Tamboura] was forthright, direct, and clear in his responses to questions. He responded in a nondefensive fashion."

In *Ngige*, the defendant challenged her criminal conviction for conspiring to defraud the government by participating in a sham marriage and making sworn false statements in support of her effort to obtain VAWA status and change her immigration status. (*Ngige, supra*, 780 F.3d at pp. 499–500.) After the Secretary denied her request for VAWA status, the government filed criminal charges. On appeal from her conviction, Ngige did not collaterally attack the Secretary’s status determination; rather, she claimed the criminal prosecution was time-barred and that her filing of a false affidavit in support of VAWA status did not constitute a requisite overt act in furtherance of the criminal conspiracy. (*Id.* at pp. 502–503.) In short, Ngige challenged the sufficiency of the evidence to support a criminal conviction, not the adequacy of the evidence to support the Secretary’s denial of her application for VAWA status.

In *Oropeza-Wong v. Gonzales*, the alien spouse challenged on direct appeal the Secretary’s determination he had entered a fraudulent marriage and consequent issuance of a removal order. (*Oropeza-Wong v. Gonzales, supra*, 406 F.3d at p. 1138.) On review of the record, the Court of Appeal concluded substantial evidence supported the Secretary’s determination. (*Id.* at p. 1139.) Among other things, the appellate court pointed to evidence that cast serious doubt on the alien spouse’s protestations of having married in good faith. (See *id.*, at pp. 1139–1140.) In any case, the factual differences in *Oropeza-Wong v. Gonzales* from those in the instant case, do nothing to enhance Tamboura’s effort to collaterally attack the Secretary’s grant of a “hardship waiver” to Kone on the ground she failed to make a complete showing to USCIS in support of her claim of abuse. As we have pointed out, neither the family law court, nor this court, has before it the complete administrative record that was before the Secretary.

Accordingly, even assuming a sponsoring spouse can collaterally challenge a determination by the Secretary as to an alien spouse’s status—a proposition we do not decide and as to which we have serious doubt—the record in the instant case is adequate to support the family law court’s rejection of Tamboura’s assertion that Kone should have been denied VAWA status and, in turn, should have been denied a “hardship

waiver,” thus subjecting her to deportation proceedings, which would have terminated his support obligations under the I-864 Affidavit. (8 C.F.R. § 213a.2, subd. (e)(2)(i)(C).)

Impact of Family Law Order

Acknowledging that under federal law an I-864 Affidavit “creates a contract between the sponsor and the U.S. Government for the benefit of the sponsored immigrant” (8 C.F.R. § 213a.2, subd. (d)), Tamboura asserts the trial court erred in failing to find in his favor on two “contract defenses”—“rescission based on a later agreement between the parties,” and “impossibility.”

Rescission

Tamboura bases his “rescission” defense on the agreement he and Kone reached just prior to their separation, that he would be a full time graduate student and she would return to Mali and reside with Tamboura’s family.

The applicable federal statute, however, does not include a “later agreement between the parties” among the specified events that terminate an I-864 Affidavit support obligation. Rather, as we have recounted, the statute states this obligation remains in effect until one of the following occurs: the alien spouse (1) becomes a U.S. citizen; (2) has worked 40 qualifying quarters under the Social Security Act; (3) loses lawful permanent residency status; (4) is placed in removal proceedings, but is granted a new status adjustment through these proceedings based on a new Affidavit; or (5) dies. (8 C.F.R. § 213a.2, subd. (e)(2)(i)(A)–(E).)

Federal courts have therefore held that “neither a divorce judgment nor a premarital agreement may terminate an obligation of support.” (*Erler v. Erler* (9th Cir. 2016) 824 F.3d 1173, 1177; *Liu v. Mund* (7th Cir. 2012) 686 F.3d 418, 419–420 (*Liu*); cf. *In re Marriage of Kumar* (2017) 13 Cal.App.5th 1072, 1083–1085 [state law concerning failure of former spouse to seek employment not applicable to enforcement of an I-864 Affidavit].) Indeed, the court in *Erler* pointed out that the information accompanying an I-864 Affidavit states: “ ‘Note that divorce *does not* terminate your obligations under this Form I-864.’ ” (*Erler*, at p. 1177.)

This authority forecloses any argument by Tamboura that because the parties, just prior to their separation, reached an agreement as to their living arrangements, he was relieved of the support obligations under the I-864 Affidavit. Tamboura contends he is not seeking to use a “prenuptial” agreement as a defense and therefore *Erler* is distinguishable. We see no material distinction, however, between a premarital agreement and the pre-separation agreement the parties made here—both concern the parties’ domestic relationship and have economic ramifications thereto.

Accordingly, under federal statutory and case law, Tamboura’s and Kone’s pre-separation agreement provided no defense to enforcement of the support obligations under the I-864 Affidavit.⁶

Impossibility

Tamboura bases his “impossibility” defense on a “January 2nd” court order, which he describes as *denying* Kone’s request that his prior income as an engineer be “imputed” to him and that he be ordered to “quit school and immediately seek reemployment.” He provides no argument, however, or legal authority as to how or why this order made it “impossible” for him to comply with his I-864 Affidavit support obligation. He has therefore failed to meet his burden as an appellant to demonstrate error by the family law court in not adopting his theory that it was “impossible” for him to perform. (See *Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948 [failure to provide legal authority to support arguments forfeits claim of error].)

In any case, a family law court order concerning the imputation of income or a calculation of support is also not among the specified events that terminate an I-864 Affidavit support obligation. (8 C.F.R. § 213a.2, subd. (e)(2)(i)(A)–(E).) Indeed, under federal case law, whatever rights an alien spouse “might or might not have under [state] divorce law” do not affect the support obligation imposed by an I-864 Affidavit. (*Liu*, *supra*, 686 F.3d at pp. 419–420.)

⁶ We therefore need not, and do not, reach any other issue in connection with Tamboura’s “rescission” defense based on the couple’s pre-separation agreement.

Accordingly, the family law court did not err in rejecting Tamboura's "impossibility" argument.

DISPOSITION

The family law court's order enforcing Tamboura's support obligation under the I-864 Affidavit is affirmed.

Banke, J.

We concur:

Margulies, Acting P.J.

Sanchez, J.

A151889, *Tamboura v. Tamboura*